

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,041

**BRIEF FOR APPELLANT AND
APPELLANT'S APPENDIX**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAY WEGENAST, In Her Own Right And As Executrix of
the Estate of John H. Pheylan, Deceased,

Appellant

v.

528

ELIZABETH G. PHEYLEN, Incompetent,

Appellee

**Appeal from the United States District Court
for the District of Columbia**

United States Court of Appeals

For the

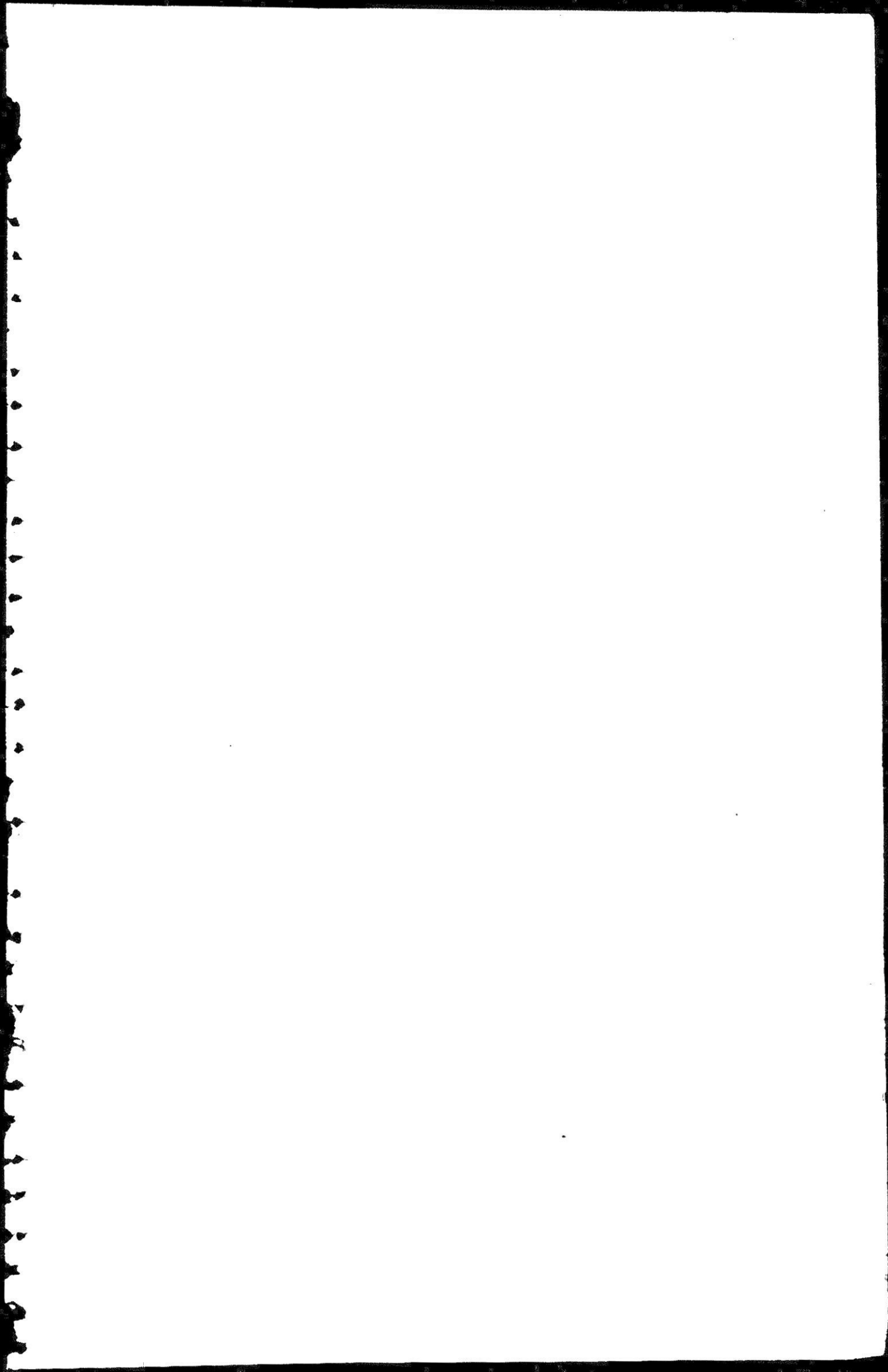
District of Columbia Circuit

FILED AUG 15 1951

Joseph W. Stewart

CLERK

ALBERT F. BEASLEY,
Investment Building,
Washington 5, D. C.,
Attorney for Appellant.



STATEMENT OF QUESTIONS PRESENTED

The questions presented are:—

1. Whether, under the provisions of Section 1623 of the D. C. Code 1901, a married man without surviving parent, brother, sister, niece or nephew has the right to dispose of *any part* of his personal estate by his valid last will and testament.

2. Whether the right of a widow, under Section 1173 of the D. C. Code 1901, as amended, to renounce her husband's will and take her "distributive share" of his personal property is defined and delimited by the common law rule respecting the widow's "paramount right" to a "reasonable part" of her husband's personal estate.

3. Whether a widow may take *the whole* net personal estate of her deceased husband, where the husband makes no provision for her in his last will and testament, and where the husband does not leave a surviving child, parent, grandchild, brother, or sister, or the child of a brother or sister.

INDEX

Subject Matter

	PAGE
STATEMENT	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF CASE.....	2
STATUTES INVOLVED	4
STATEMENT OF POINTS.....	6
SUMMARY OF ARGUMENT.....	7
ARGUMENT	9
I. The Right to Dispose of Property by Will is Not Dependent Upon Marital Status or the Existence and Survival of Particular Heirs or Next of Kin.....	9
II. At Common Law, the Right of a Married Man to Dispose of His Property by Will Was Subject Only to the Widow's Right to Dower in Realty and Reasonable Part of Personalty	11
III. The Statutory Requirement for a Widow to Renounce a Bequest in Her Husband's Will and Elect to Take Her "Share" Was Enacted as a Limitation Upon the Common Law Rights of the Widow.....	13
IV. In Amending Section 1173, Congress Did Not Intend to Abrogate the Common Law Rule as to a Widow's "Share", and the Section Should be Construed Accordingly....	15
V. The Widow's "Distributive Share" Should be Limited to One-Half to Avoid an Ab- surd and Unjust Result.....	23
VI. The Court Erred in Striking Portions of the Complaint	27
CONCLUSION	28

Citations

PAGE

Table of Cases:

Carr v. Washington & O. D. Ry., 44 App. D. C. 533	20
Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 S. Ct. 511.....	23
Coomes v. Clements, 4 Harris & J. (Md.) 480.....	11
Ex Parte Redmond, 3 App. D. C. 317.....	20
Griffith v. Griffith's Executors, 4 Harris & McH. (Md.) 101	11
Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 S. Ct. 787.....	23
Helvering v. New York Trust Co., 292 U. S. 455, 468, 78 L. ed. 1361, 1368, 54 S. Ct. 806.....	22
Holzbeierlein v. Holzbeierlein, 67 App. D. C. 219, 91 F. (2d) 250.....	10
In Re Chapman, 166 U. S. 661, 41 L. ed. 1154, 17 S. Ct. 677.....	23
Irving Trust Co. v. Day, 314 U. S. 556, 562, 86 L. ed. 452, 457, 62 S. Ct. 398, 137 A. L. R. 1093	9
Janof v. Newsom, 60 App. D. C. 291, 53 F. (2d) 149	20
Jordan v. American Security & Trust Co., 38 App. D. C. 391.....	11, 14
King v. District of Columbia, 51 App. D. C. 160, 277 F. 562.....	20
Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 S. Ct. 517.....	23
London & Lancashire Indemnity Co. v. Smoot, 52 App. D. C. 378, 287 F. 952.....	20
Mead v. Phillips, 77 U. S. App. D. C. 365, 135 F. (2d) 819.....	11, 14
Moss v. U. S., 29 App. D. C. 188.....	20
Ozawa v. United States, 260 U. S. 178, 194, 67 L. ed. 199, 207, 43 S. Ct. 65.....	22, 23
Rusing v. Rusing, et al 25 Ind. 63.....	26
Small v. United States, 71 App. D. C. 332, 110 F. (2d) 122, 127 A. L. R. 814.....	20
United States v. American Trucking Association, 310 U. S. 534, 542, 84 L. ed. 1345, 1350, 60 S. Ct. 1059.....	20

INDEX (Continued)

iii

PAGE

Washington Terminal Co. v. District of Columbia, 36 App. D. C. 186.....	20
---	----

Other Citations:

Bouvier's Law Dictionary.....	24
Congressional Record, 66th Congress, Second Session Senate—April 6, 1920, Pages 5237-5238	20
House of Representatives—March 17, 1920, Pages 4487-4493	20
D. C. Code 1901	
Section 1	13
Section 374	23, 24
Section 375	26
Section 376	27
Section 1623	9
Section 1173	14, 15
Hearing Before Sub-Committee No. II of the Committee On The Judiciary, House of Representatives, 66th Congress, First Session on H.R. 4471 and H.R. 6025, Serial 3, August 25, 1919	19
Hearings Before the Committee on the Judiciary, House of Representatives, 64th Congress, First Session on H.R. 14974, Serial 47, May 5, 1916	17
Page on Wills, Section 201.....	26
Report of Committee on the Judiciary, No. 481, House of Representatives, 66th Congress, Second Session, To Accompany H.R. 6025—Dec. 9, 1919	19
Webster's New International Dictionary (Second Edition—Merriam)	24

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,041

MAY WEGENAST, In Her Own Right And As Executrix of
the Estate of John H. Pheylan, Deceased,
Appellant

v.

ELIZABETH G. PHEYLEN, Incompetent,
Appellee

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

STATEMENT

This is an appeal from the judgment entered by the United States District Court for the District of Columbia against the appellant (plaintiff there) and in favor of the appellee (defendant there) determining the rights of the parties in and to the net distribution of the Estate of John H. Pheylan, deceased.

JURISDICTIONAL STATEMENT

Appellant (as plaintiff there), in her own right and as executrix of the Estate of John H. Pheylan, deceased, filed this action in the United States District Court for the District of Columbia on the 10th day of December, 1949, seeking a determination of the respective rights of inheritance of appellant, in her individual right, and of appellee in and to the net distribution of the Estate of John H. Pheylan, deceased, thereby invoking the general original jurisdiction of the said Court in equity (Secs. 301, 305, 306 and 325, Title 11, D. C. Code, 1940), the jurisdiction of the Probate Court not being exclusive (Sec. 504, Title 11, D. C. Code, 1940). Appellant also relied upon Sec. 2201, Title 28, U. S. Code, to the extent that the relief sought might be deemed declaratory.

The judgment appealed from was entered by the District Court on the 12th day of February, 1951. The notice of appeal was duly filed on the 13th day of March, 1951.

Appellant invokes the jurisdiction of this Honorable Court to review and reverse the judgment of the District Court (Sec. 1291, Title 28, U. S. Code).

STATEMENT OF CASE

Appellant is the executrix of the estate of John H. Pheylan, who died, *testate*, on the 17th of February, 1948, in the District of Columbia, at the age of 72 years. She is also the sole devisee and legatee under the last will and testament of the said John H. Pheylan, executed on the 24th of May, 1934, which has been duly proven and admitted to probate and record by the United States District Court for the District of Columbia, holding a Probate Court.

Appellee is the widow of the said John H. Pheylan. She is an incompetent, having been adjudged to be of unsound

mind on the 5th of February, 1926 by the United States District Court for the District of Columbia, and having been a patient at St. Elizabeth's Hospital continuously since that date. Harold V. Boisvert, Esq., was duly appointed, and has qualified, in the said lunacy proceedings in the District Court, as the committee of the person and the estate of appellee; and he has appeared in her behalf in this case. When the answer was filed in her behalf in February, 1950, appellee was approximately 73 years of age. The said will of John H. Pheylen, executed a little more than eight years after appellee was adjudged to be of unsound mind and committed to St. Elizabeth's Hospital, makes no provision for appellee.

The said John H. Pheylen and appellee did not have any children. His parents predeceased him. He had no sisters; but he did have one brother, Paul J. Pheylen, who resided in Richford, New York, and who died in or about August, 1945, leaving a surviving widow but no children. The said John H. Pheylen had no other close relatives; and his heirs at law and next of kin are unknown.

After the will had been probated and appellant had been appointed and qualified as executrix of the estate of John H. Pheylen, the committee of appellee asserted the claim that the will of John H. Pheylen is inoperative to devise or grant *any part* of the said decedent's estate to appellant, and that appellee is entitled to receive the entire net estate, after payment of decedent's debts and costs of administration, in view of the provisions of Sec. 211, Title 18, D. C. Code 1940.

Appellant, in her individual right, conceded that appellee is entitled to the widow's "distributive share" of the estate; but claimed that such "share" should be no more than one-half of the net estate, and that the other one-half would pass to her under and by virtue of the decedent's will.

Appellant, in her representative capacity, required a binding and final judicial determination as to the issues between herself individually and the appellee, in order that she might properly administer the estate and distribute the net proceeds of the estate according to law.

In this situation, appellant filed this action in her own right and as executrix of the estate of John H. Pheylen, deceased, against the appellee, for a judicial determination as to the rights of the parties respecting distribution of the net proceeds of the estate. Appellee and her committee were served, and the committee appeared and answered in behalf of appellee. There being no genuine issue as to any material fact, appellee, by and through her committee, filed a motion for summary judgment, and appellant filed a motion for summary judgment.

The motions were duly argued and presented to the District Court; and the Court filed a memorandum opinion, holding "that the widow who renounces a will made by her husband, where there are no intervening heirs, is entitled to the whole of her husband's personal estate", and directing the entry of judgment for the defendant. Thereafter, on the 12th of February, 1951 the Court entered the final order, or judgment, in favor of appellee and against appellant.

Appellant filed notice of appeal on the 13th of March, 1951, and has since prosecuted her appeal to this Honorable Court.

STATUTES INVOLVED

The following provisions of the District of Columbia Code are deemed to be pertinent to the issues involved in this case:

Section 201—Title 19, D. C. Code 1940

"Sec. 19-201 (29:41). What may be devised.

"All lands, tenements, and hereditaments, and personal

estate which might pass by deed or gift, or which would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs or other representatives, shall be subject to be disposed of, transferred, and passed by his or her last will, testament, or codicil, in accordance with the provisions of this title. (Mar. 3, 1901, 31 Stat. 1433, ch. 854, § 1623.)"

Section 211, Title 18, D. C. Code 1940

"Sec. 18-211 (14:38). Renunciation of devisees and bequests—Form—Limitation—Interest to be taken by widow or widower upon such renunciation.

"A widow shall be barred of her right of dower in the land and share in the personal estate by any such devise or bequest unless within six months after administration may be granted on her husband's estate she shall file in the probate court a written renunciation * * *

"By renouncing all claim to any and all devises and bequests, made to her by the will of her husband, she shall be entitled, in addition to her dower, to the distributive share of his personal property, which she would have taken had he died intestate, and, except in cases of valid antenuptial or postnuptial agreements, this provision for the wife shall apply with the (sic) effect (without formal renunciation) to cases where the husband has made no devise or bequest to his wife.

"* * * (Mar. 3, 1901, 31 Stat. 1376, ch. 854, Sec. 1173; Apr. 19, 1920, 41 Stat. 567, ch. 153.)"

Section 702—Title 18, D. C. Code 1940

"Sec. 18-702 (29:282). When surviving spouse entitled to whole.

"If the intestate leave a widow or surviving husband and no child, parent, grandchild, brother, or sister, or the child of a brother or sister of the said intestate, the said widow or surviving husband shall be entitled to the whole. (Mar. 3, 1901, 31 Stat. 1249, ch. 854, Sec. 374; Apr. 19, 1920, 41 Stat. 563, ch. 153.)"

Section 703—Title 18, D. C. Code 1940

"Sec. 18-703 (29:283). When surviving spouse entitled to one-third.

"If there be a widow or surviving husband and a child or children, or a descendant or descendants from a child, the widow or surviving husband shall have one-third only. (Mar. 3, 1901, 31 Stat. 1249, ch. 854, Sec. 375; Apr. 19, 1920, 41 Stat. 563, ch. 153.)"

Section 704, Title 18, D. C. Code 1940

"*Sec. 18-704 (29:284). When surviving spouse entitled to one-half.*

"If there be a widow or surviving husband and no child or descendants of the intestate, but the said intestate shall leave a father or mother, or brother or sister, or child of a brother or sister, the widow or surviving husband shall have one-half. (Mar. 3, 1901, 31 Stat. 1249, ch. 854, Sec. 376; April 19, 1920, 41 Stat. 563, ch. 153.)"

Section 301, Title 49, D. C. Code 1940

"*Sec. 49-301 (1:21) Common law, principles of equity and admiralty, and Acts of Congress to remain in force.*

"The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general Acts of Congress not locally inapplicable in the District of Columbia, and all Acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress. (Mar. 3, 1901, 31 Stat. 1189, ch. 854, § 1.)"

STATEMENT OF POINTS

1. A married man without surviving issue, parent, brother, sister, niece or nephew is not deprived of all right to dispose of *any part* of his personal property by will.

2. Section 1173 of the Code (Sec. 211, Title 18, D. C. Code 1940), as amended by the Act of April 19, 1920, was not intended to abrogate the common law rule, and

should be construed as giving the widow a paramount right to renounce her husband's will and take her reasonable part of one-third or one-half of his personal property, according to her predicament, but no more.

3. A widow should not have a paramount, preemptive and indefeasible right to take "the whole" of her husband's personal property, contrary to his valid last will and testament, merely upon the fortuitous circumstance that he died without leaving surviving issue, parent, brother, sister, niece or nephew.

4. The District Court erred in the holding "that the widow who renounces a will made by her husband, where there are no intervening heirs, is entitled to the whole of her husband's personal estate."

5. The District Court erred in holding that the appellee "is entitled to the entire estate of John H. Pheylen, deceased, after the debts, obligations, and costs of administration of the said estate as approved by the Probate Court have first been paid".

6. The District Court erred in striking the first three sentences of paragraph 5, paragraph 7, paragraph 9 and paragraph 10 of the complaint.

SUMMARY OF ARGUMENT

Point 1. The right to dispose of property by will is granted by Section 1623 of the Code. The proprietor may dispose of, transfer and pass by will all personal property which might pass by deed or gift, or which would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs or other representatives. This right is unqualified, and extends to all persons, regardless of marital status or the existence and survival of particular heirs or next of kin.

Point 2. At common law, the right of a married man to dispose of his property by will was subject only to the widow's right to dower in realty and reasonable part of personalty. The "reasonable part" of personal property over which the widow had a "paramount right" was one-third or one-half, according to her predicament, that is, one-third if there were surviving children or one-half if there were no surviving children. This rule became the common law of the District of Columbia, and remains in force and effect unless inconsistent with or replaced by subsequent legislation.

Point 3. The statutory requirement for a widow to renounce a bequest in her husband's will and elect to take her "share" was enacted as a limitation upon the common law rights of the widow, so as to avoid the result of early decisions permitting a widow to take under the will and also take her legal interest as well. The nature and purpose of the renunciation provision is to protect and secure the widow's right to a "reasonable part" of her husband's estate, consistently with the common law rule.

Point 4. In amending Section 1173 of the Code, and providing that a widow might renounce her husband's will and take "the distributive share of his personal property, which she would have taken had he died intestate", the Congress did not intend to abrogate the common law rule as to what constituted a widow's "share", and Section 1173 should be construed as giving effect to the common law rule. The legislative history of the 1920 amendment to Section 1173 indicates that Congress intended to apply the common law rule. The primary rule of statutory construction is that the courts will ascertain and give effect to the intention of the legislature. If Congress had intended to make any radical change in the law, there would have been some expression of purpose to do so; and in the absence of any showing of intent to change the law, the courts should not erect the same upon inference or mere change in language.

Point 5. The widow's distributive share should be limited to one-half of the net personal estate to avoid an absurd and unjust result. Appellee's claim that the "distributive share" becomes "the whole" of the net personal estate, solely because the testator did not leave a surviving parent, brother, sister, niece or nephew, is not justifiable upon any rational basis. A "share" cannot be "the whole". If the widow takes "the whole" of the personal estate, then Section 1623 is nullified contrary to the plain provisions thereof. Existence or non-existence of surviving parents, brothers, sisters, nieces or nephews of the husband is a wholly fortuitous circumstance as far as the widow is concerned, and should not alter her "paramount" rights.

Point 6. The Court erred in striking portions of the complaint. The points stricken were not wholly immaterial to the issues presented.

ARGUMENT

I. The Right to Dispose of Property by Will is Not Dependent Upon Marital Status or the Existence and Survival of Particular Heirs or Next of Kin.

While "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance" (*Irving Trust Co. v. Day*, 314 U. S. 556, 562, 86 L. Ed. 452, 457, 62 S. Ct. 398, 137 A. L. R. 1093), the right to devise property by will is of ancient origin and is a recognized and subsisting right in this jurisdiction, as is set forth in Section 1623 of the D. C. Code 1901 (Sec. 201, Title 19, D. C. Code 1940).

Section 1623 authorizes and empowers "the proprietor" to dispose of, transfer and pass by his last will and testament "*All lands, tenements, and hereditaments, and per-*

sonal estate which might pass by deed or gift, or which would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs or other representatives". (Emphasis added).

There can be no question but that the proprietor of personal property can dispose of it by deed or gift during his lifetime (*Holzbeierlein v. Holzbeierlein*, 67 App. D. C. 219, 91 F. (2d) 250), and thus the language of Section 1623 gives an unqualified right to "the proprietor" to dispose of *all* of his personal estate. The remaining descriptive clause or words of limitation are connected by the disjunctive "or", and thereby are an alternative to describe what disposition would be made in case of intestacy. But even under the alternative clause, there is no qualification in describing personal property which would "descend to or devolve on his or her heirs or other representatives". The "heirs or other representatives" is not qualified or limited to any degree of consanguinity or affinity, or to the one or the other. At death, everyone has "heirs or other representatives" of some degree or kind of relationship; and the most remote relationship fully satisfies the wording of the statute.

The term "proprietor" is not qualified in any sense, and plainly includes any owner of property. Certainly, the right to dispose of one's property is not granted exclusively to unmarried persons or to married persons having a surviving parent, brother, sister, or child of a brother or sister. The Section applies to all residents of the District of Columbia. Thus, the right to dispose of, transfer and pass property by last will and testament, extends to all personal property of all residents of the District of Columbia, and is not dependent upon marital status or the existence and survival of particular heirs or next of kin.

II. At Common Law, the Right of a Married Man to Dispose of His Property by Will Was Subject Only to the Widow's Right to Dower in Realty and Reasonable Part of Personalty.

The only qualification of, or limitation upon, the right of a married person to dispose of his property by will, that was and is recognized by the common law, is the "paramount right" of a widow to her dower in realty and her "reasonable part" of personalty owned by her husband. Such "reasonable part" of her husband's personal property was one-third or one-half, according to her predicament, i.e., one-third if there were surviving children, or one-half if there were no surviving children. This rule became and was the common law of Maryland, and, in turn, the common law of the District of Columbia.

Griffith v. Griffith's, Executors, 4 Harris & McH. (Md.) 101.

Coomes v. Clements, 4 Harris & J. (Md.) 480.

Jordan v. American Security & Trust Co., 38 App. D. C. 391.

Mead v. Phillips, 77 U. S. App. D. C. 365, 135 F. (2d) 819.

In *Mead v. Phillips*, *supra*, this Court reviewed and summarized the rule as follows:

"This Court has declared the long established policy of the law to be the protection of the wife and the securing to her of a reasonable portion of her husband's estate.¹⁸ In so doing, it relied upon the early decisions of the Maryland courts, particularly *Coomes v. Clements*.¹⁹ In that case the court said:²⁰ '... it was

¹⁸ *Jordan v. American Security & Trust Co.*, 38 App. D. C. 391, 394.

¹⁹ 4 Harris & J. (Md) *480.

²⁰ *Id* at *483."

the common law of England, at the colonization of Maryland, or the grant of the charter to Maryland, and long antecedent to that time, that a widow was entitled to her reasonable part of the goods of her husband, his debts and funeral expenses having been first deducted; and that that reasonable part was one-third, or one-half, according to the predicament in which she stood at the time of the death of her husband; that this reasonable part was not subject to the dominion or control of her husband; that her right was paramount his power, and that he could not, by his will, deprive her of it.' Under the common law existing in Maryland prior to creation of the District of Columbia, a husband was not permitted to deprive his wife of her reasonable share of his estate, either directly or indirectly, and a bequest to the wife was not considered in lieu of her legal interest; instead she took both.²¹ It was to avoid the result reached by the early cases, permitting a wife to take both under the will and her legal interest as well, that statutes were enacted which required the widow to elect between the two.²² But it was not the purpose of those statutes to deprive a widow of her common law rights.

* * * *

"Although, as already indicated, the Maryland Court of Appeals early recognized the common law rights of widows,³¹ and interpreted the statutes of the state accordingly; later Maryland cases, decided long after the creation of the District of Columbia—and upon which appellees rely in the present case—have drifted in another direction. This shifting of position is illustrated by comparing relevant language of the earlier and later cases. Thus, in *Griffith v. Griffith's Executors*,³² decided in 1798, Justice Chase, speaking for

²¹ *Jordan v. American Security & Trust Co.*, 38 App. D. C. 391, 394; 4 Harris & McH. (Md.) *101.

²² *Jordan v. American Security & Trust Co.*, 38 App. D. C. 391, 394.

³¹ *Coomes v. Clements*, 4 Harris & J. (Md.) *480, *483; *Griffith v. Griffith's Ex'rs*, 4 Harris & McH. (Md.) *101.

³² 4 Harris & McH. (Md.) *101, *122."

the court said: 'I consider the Acts of Assembly of 1704, 1715 and 1729, as a clear and explicit *recognition of the right* of the wife to one-third part of the personal estate; and I consider these successive Acts of the Legislature, and the uniform practice conformable thereto, as *the best evidence* of what was *the common law* in the opinion and judgment of the Legislature and citizens of Maryland.' (Italics supplied) In 1798 the Act was passed which later became, without material alterations, the law of the District of Columbia.³³ Thereafter, in *Coomes v. Clements*,³⁴ Justice Chase, speaking again for the court, said: 'The several Acts of Assembly relating to the right of the wife to a part of the personal estate of her deceased husband, commencing with the Act of 1699, down to the Act of 1798, contain a clear, unequivocal, and explicit *recognition of that principle of the common law*, which allows to the wife a reasonable part of the personal estate of her deceased husband.' This exposition of the law of Maryland was expressly adopted by this court in 1912, as constituting a correct declaration of the law of the District.³⁵

The common law rule remains in force and effect in the District of Columbia except insofar as the same is inconsistent with or replaced by subsequent legislation of Congress (Section 1, D. C. Code 1901; Section 301, Title 49, D. C. Code 1940).

III. The Statutory Requirement for a Widow to Renounce a Bequest in Her Husband's Will and Elect to Take Her "Share" Was Enacted as a Limitation Upon the Common Law Rights of the Widow.

In recognition of the widow's common law right to dower in realty and reasonable part of personalty, the early

³³ *Jordan v. American Security & Trust Co.*, 38 App. D. C. 391, 395.

³⁴ 4 Harris & J. (Md.) *480, *483.

³⁵ *Jordan v. American Security & Trust Co.*, 38 App. D. C. 391, 395."

decisions of the courts, construing provisions of a deceased husband's will, held that the widow was entitled to take under the will and also take her legal interest as well. It was to avoid that result that statutes were enacted requiring the widow to renounce a bequest in her husband's will and elect to take her legal or common law "share" of his estate.

Jordan v. American Security & Trust Co., 38 App. D. C. 391.

Mead v. Phillips, 77 U. S. App. D. C. 365, 135 Fed. 2d 819.

Section 1173 of the D. C. Code 1901 (Sec. 211, Title 18, D. C. Code 1940), as originally enacted by Congress, required a widow to renounce all claim to any bequest or devise in her husband's will, or be barred of her dower in realty or share in personalty. By renouncing, the widow became "entitled to one-third part of the personal estate of her husband which shall remain after payment of his just debts and claims against him, and no more".

Thus, the very nature and purpose of Section 1173 was to impose a limitation upon the rights of the surviving widow, by requiring her to elect between the provisions of her deceased husband's will and her common law share or "reasonable part" of his estate. While Section 1173 gave the widow a right to only one-third of her deceased husband's personal estate, instead of the alternative one-third or one-half as determined by the common law rule, there does not appear to have been any purpose to abrogate the common law rule giving a widow the "paramount right" to a "reasonable part" of her deceased husband's personal estate. On the contrary, the purpose was to recognize and restate the common law rights of the widow in this respect.

As stated by this Court in *Mead v. Phillips*, *supra*:

"* * * The statutory provision for widows in the District"²⁹ constitutes a recognition and, in part, a restatement of her rights at common law. It is not to be regarded as a repudiation or abrogation of the common law or as manifesting an intention to occupy the area to the exclusion of the common law. Instead, to the extent that the statutes fail to cover the entire subject, the common law is to be looked to for amplification and definition.³⁰ Instead of a privilege bestowed by the statute, the requirement of an election is a limitation upon the common law rights of the widow, and must be so construed. .

IV. In Amending Section 1173, Congress Did Not Intend to Abrogate the Common Law Rule as to a Widow's "Share," and the Section Should Be Construed Accordingly.

In 1920 Congress amended Section 1173 of the Code. As amended, Section 1173 changed the wording of paragraph 2 so that, by renouncing, the widow became "entitled, in addition to her dower, to *the distributive share of his personal property, which she would have taken had he died intestate*" (emphasis added); and the provision was made applicable with like effect, without renunciation, to cases where the husband made no devise or bequest to his wife. And, a similar paragraph was added giving the husband a similar right to renounce his wife's will.

This amendment to Section 1173 was one of many amendments made to the Code. Examination of the legislative history of the amendments discloses that they were

²⁹ D. C. Code (1940) §§ 18-201, 205, 206, 207, 208, 209; 701-705.

³⁰ *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 162, 96 S. E. 315, 317; *Perry v. Strawbridge*, 209 Mo. 621, 637, 108 S. W. 641, 645; *Horace Waters & Co. v. Gerard*, 189 N. Y. 302, 309, 82 N. E. 143, 145."

contained in Public Law No. 181, 66th Congress, Second Session, which enacted into law the Bill H. R. 6025. It further appears that the identical bill was first introduced in the 64th Congress, First Session, where it was known as H. R. 14974. Apparently, the proposed amendments to the Code lay dormant during the period of World War I. However, when hearings were held on the Bill H. R. 6025, reference was made to the prior bill and the hearings thereon, and so, in reviewing the legislative history of the 1920 amendments to the Code, it is necessary to go back and review the hearings on the Bill H. R. 14974.¹

With particular reference to Section 1173 and to Sections 374-377, it is apparent that the purpose of the amendments was to put husband and wife on an equal basis; that as to Section 1173, the only explanation of the amendment was that either widow or widower would get one-third of the deceased spouse's personal property if there were children surviving or one-half of such property if no child survived; and that there is nothing in the entire legislative history of the amendments to indicate any purpose or intent to abrogate or change the common law rule respecting the rights of a widow to share in her deceased husband's personal estate.

The only discussion upon the proposed amendment to Section 1173 was in the hearing before the Committee

¹ Counsel for appellant has obtained a copy of "*Hearings Before The Committee on the Judiciary, House of Representatives, Sixty-Fourth Congress, First Session, on H. R. 14974, Serial 47, May 5, 1916,*" and copy of "*Hearing Before Subcommittee No. II of the Committee on the Judiciary, House of Representatives, Sixty-Sixth Congress, First Session, on H. R. 4471 and H. R. 6025, Serial 3, August 25, 1919,*" and a photostat copy of "*Report of Committee on the Judiciary, No. 481, House of Representatives, 66th Congress, Second Session, To Accompany H. R. 6025—Dec. 9, 1919,*" all of which are hereinafter referred to, and will lodge the same with the clerk of the Court for the convenient reference of the Court.

On The Judiciary, House of Representatives upon the antecedent Bill H. R. 14974, the pertinent portions of which are as follows:

"Hearings Before The Committee On The Judiciary, House of Representatives, Sixty-Fourth Congress, First Session, on H. R. 14974, Serial 47, May 5, 1916.

* * * *

Pages 72-73

*"Mr. Sullivan. * * * Sections 374 to 377, inclusive, put the husband in the same situation as the wife.*

"The Chairman. Section 374; is that a material change in your law here?

"Mr. Sullivan. That is a very material change, because under section 1160 at the present time, the husband gets all the personal estate of his wife, whatever may be the conditions, and he gets the absolute right to administer upon her personal estate, but by this he is given exactly the same as the wife would get. In other words, if they have no children, he gets one-half. (Emphasis added)

"Judge Covington. That is the only change that these proposed amendments make in our substantive law. (Emphasis added)

"Mr. Sullivan. Where a man dies, leaving a personal estate of only a thousand dollars, there might be a question of whether that whole thousand dollars should not go directly to the wife, instead of having her subjected to probate proceedings.

"Mr. Igoe. What is the amount now that a widow may receive?

"Mr. Sullivan. There is none. There is an exemption of household goods of \$300. There ought to be some.

"Mr. Igoe. Have you made any provision for it?

"Mr. Caraway. 'If there be a widow or surviving husband and a child or children, or a descendant or descendants from a child, the widow or surviving husband shall have one-third only.' That is without any regard to the amount of the estate?

"*Mr. Sullivan.* We do not consider a limitation upon that in the case of a small estate.

"*Mr. Tobriner.* At common law she only got a reasonable part. What that was, was in the air.

"*Judge Covington.* This is the law that we inherited from Maryland, and all we have done is insert the phrase 'surviving husband', and thus put him on the same plane with the wife. (Emphasis added)

"*Mr. Gard.* Section 376 is one that I do not understand very well. I have just been glancing over it hastily. It provides:

'If there be a widow or surviving husband and no child or descendants of the intestate, but the said intestate shall leave a father or mother, or brother or sister, or child of a brother or sister, a widow or surviving husband shall have one-half.'

"*Mr. Sullivan.* In other words, where there are no children, the surviving spouse gets half. Where there are children, the surviving spouse gets one-third. That is the present law, but under the present law there is a discrimination between the husband and the wife, and we are eliminating that discrimination. But that other suggestion about a small estate is a matter, I think, that might well be considered before this goes through." (Emphasis added).

* * * *

80-81

Mr. Hoehling. * * * Now, 1160 we eliminate entirely. We have provided for that in other sections.

"*Mr. Easby-Smith.* That is one that gives the husband all of the wife's personal property. We put him now on the same footing with the wife.

"*Mr. Hoehling.* 1173, on the next page, carries out the same idea of putting a wife and husband on an equality. (Emphasis added) We had a provision in the code as to renunciation by the wife, and we make that some provision for the husband.

"*Mr. Sullivan.* She can take her legal share."

When the hearing was held on the Bill H. R. 6025, Justice Gould and representatives of the Bar Association appeared in support of the bill; but the transcript

of the hearing indicates that reference was made to the hearings on the antecedent bill, which was held before the same Committee of the House, and as to which certain members of the Committee indicated recollection; and that there was no detail or specific discussion of any of the amendments that are pertinent here. In fact, most of the transcript refers to the discussion of the companion bill, which was a bill to enlarge the jurisdiction of the Municipal Court. See: *Hearing Before Subcommittee No. II of the Committee on the Judiciary, House of Representatives, Sixty-Sixth Congress, First Session On H. R. 4471 and H. R. 6025, Serial 3, August 25, 1919.*

When the Committee on the Judiciary made its report to the House, it quoted letters of endorsement from Chief Justice McCoy of the Supreme Court of the District of Columbia and the statement of Justice Gould of said Court in his appearance before the Committee, and then set forth in parallel columns the provisions of the proposed amendments opposite to the provisions of the existing sections of the Code which would be changed by the amendments. There is no specific discussion of any of the amendments that are material here. See: *Report of Committee on the Judiciary, No. 481, House of Representatives, 66th Congress, Second Session, To Accompany H. R. 6025—Dec. 9, 1919.*

Examination of the Congressional Record discloses that the Bill H. R. 6025 was called up by Congressman Vollstead for consideration by the House on March 17, 1920; that the entire bill was read, and that a statement was made that the bill had been carefully considered by the Sub-Committee and that amendments were approved by the judges and the Bar Association. It then appears that discussion was had and amendments were made regarding: (1) Provisions to transfer law cases to equity, and vice-versa; (2) Protection of the interests of soldiers in St. Elizabeth's Hospital; and (3) Qualifications of the Jury Commission. Then the record shows that the bill

was passed. There was no discussion about the amendment to Section 1173 or any other section related thereto. See: *Congressional Record, 66th Congress, Second Session—House of Representatives—March 17, 1920, Pages 4487-4493.*

Further examination of the Congressional Record discloses that the Bill H. R. 6025 was called up by Senator Kellogg for consideration by the Senate on April 6, 1920; that the reading of the bill was dispensed with; that an amendment was made regarding the authority of the Supreme Court of the District of Columbia to prescribe equity rules; and that then the bill was passed. There was no discussion about the amendment to Section 1173 or any other related section. See: *Congressional Record, 66th Congress, Second Session—Senate—April 6, 1920, Pages 5237-5238.*

The primary, if not dominant, rule of statutory construction is that the courts will ascertain and give effect to the intention of the legislature. This Court has so held many times. See, e.g., *Ex Parte Redmond*, 3 App. D. C. 317; *Moss v. U. S.*, 29 App. D. C. 188; *Washington Terminal Co. v. District of Columbia*, 36 App. D. C. 186; *Carr v. Washington & O. D. Ry.*, 44 App. D. C. 533; *King v. District of Columbia*, 51 App. D. C. 160, 277 F. 562; *London & Lancashire Indemnity Co. v. Smoot*, 52 App. D. C. 378, 287 F. 952; *Janof v. Newsom*, 60 App. D. C. 291, 53 F. (2d) 149; *Small v. United States*, 71 App. D. C. 332, 110 F. (2d) 122, 127 A. L. R. 814. The Supreme Court of the United States stated the rule, with a host of citations, in *United States v. American Trucking Association*, 310 U. S. 534, 542, 84 L. Ed. 1345, 1350, 60 S. Ct. 1059, thusly:

“In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context

and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' * * *

Thus, it appears evident that neither the sponsors of the amendment nor the members of Congress, in passing the legislation, had any idea or thought of abrogating the common law rule in respect to a widow's "share" in her husband's personal estate. In fact, it affirmatively appears that the change in Section 1173 was proposed and explained by the sponsors of the amendment as a means whereby husband and wife were placed in a position of equality, each in respect to the personal estate of the other, and whereby the surviving spouse would get one-third of the other's personal estate if children survived or one-half if there were no surviving children. Congress accepted that explanation without question or challenge. The idea that the amendment might give a surviving widow the preemptive right to take the entire personal estate of her deceased husband, contrary to his will and regardless of the amount thereof, never occurred to any-

one, nor is there any reason that it should have, considering that such a result would have been an innovation hitherto unknown to the law.

If there had been any intention to make such a radical departure from the existing law as to give a widow the preemptive right to nullify or veto her husband's will in its entirety as to his personal property regardless of amount, is it not reasonable to expect that there would have been an affirmative showing in support of such a proposal? Certainly, there would have been, and there would have been discussion, if not debate, upon such a proposal. "Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law" *Helvering v. New York Trust Co.*, 292 U. S. 455, 468, 78 L. Ed. 1361, 1368, 54 S. Ct. 806. The Court is asked (by appellee) "to conclude that Congress, without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, * * * has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the government—a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions—would have been deprived of its force in such dubious and casual fashion." *Ozawa v. United States*, 260 U. S. 178, 194, 67 L. Ed. 199, 207, 43 S. Ct. 65.

It is submitted that Congress had no intention of abrogating the common-law rule respecting the widow's "share" in her husband's estate; and that the Court, accordingly, should construe Section 1173 as giving the widow a preemptive or dominant right to no more than one-half of her husband's personal estate.

V. The Widow's "Distributive Share" Should Be Limited to One-Half to Avoid an Absurd and Unjust Result.

As a corollary to the rule of statutory construction that the courts will ascertain and give effect to the intention of the legislature is the rule that the courts will give a statute a sensible construction and a construction that will avoid absurd and unreasonable results. *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 S. Ct. 511; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 S. Ct. 517; *In Re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 S. Ct. 677; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 S. Ct. 787; *Ozawa v. United States*, 260 U. S. 178, 67 L. ed. 199, 43 S. Ct. 65.

In prior points herein it has been demonstrated that the public policy in such cases is to secure to a surviving widow a reasonable part of her husband's personal estate, that in furtherance of this policy the common law rule adopted in Maryland and, in turn, in the District of Columbia allowed a widow to take one-half or one-third, according to her predicament, and that the statute requiring renunciation of her husband's will was enacted as a limitation upon the common law rights of a widow, so as to prevent her from taking her common law "share" and also taking under the will. It has also been demonstrated that Congress did not intend to abrogate the common law rule in amending Section 1173 so as to authorize a widow to renounce her husband's will and take "the distributive share of his personal property, which she would have taken had he died intestate".

In this case, there being no surviving issue, appellee claims that the "distributive share" which she is entitled to take under the provisions of Section 1173 becomes "the whole" of the decedent's net personal estate, under the provisions of Section 374 of the Code (Section 702, Title 18, D. C. Code 1940), solely because the testator did not

leave a surviving parent, brother, sister, niece or nephew. While this result may be authorized by the literal wording of the statute, such a result was not only not intended by the Congress, but also is an absurd and unjust result.

In case of intestacy, the widow does become entitled to take "the whole" of the net personal estate, under the provisions of Section 374, if the intestate does not leave a surviving "child, parent, grandchild, brother or sister, or the child of a brother or sister". In other words, instead of allowing some distant, collateral heir to inherit a part of the estate, the widow is given "the whole". This, in effect, makes the widow an heir or next of kin, and gives her the right to inherit all of her deceased husband's personal estate in the absence of a valid will. But the underlying purpose for giving the widow "the whole" of her deceased husband's personal estate is a radically different thing from the recognition and enforcement of the "paramount rights" of the widow to her "reasonable part" of her deceased husband's personal estate, his will to the contrary notwithstanding.

The language of Section 1173 indicates that a surviving widow was not intended to take "the whole" of her husband's personal estate, in that it authorizes her to take her "distributive share".

"Share" is defined as being "a portion" or "the part allotted or belonging to one of a number owning together any property or interest", or "the undivided interest of any one of a number owning jointly or in common". Webster's New International Dictionary (Second Edition—Merriam). Also, see Bouvier's Law Dictionary.

If Section 1173 authorizes a widow to take "the whole" of her husband's personal estate, contrary to his will, then there is a conflict between Section 1173 and Section 1623 of the Code, the latter of which authorizes and empowers the husband to dispose of, transfer and pass his

property by his last will and testament; and the result would be to nullify Section 1623, contrary to the plain provisions thereof.

While a variation in the widow's share between one-third and one-half, dependent upon whether or not there are surviving children, may be said to have reasonable relevance to marital status and the husband's obligations for the support of his wife, it is wholly irrational to vary the widow's share upon the basis of the existence or non-existence of surviving parents, brothers, sisters, nieces or nephews of the husband, without any regard to any of such persons being dependent upon the husband. It may be said that husband and wife have some control over the existence or non-existence of children; but neither one has any control over the existence or non-existence of a surviving parent, brother, sister, niece or nephew of the husband. Unless one of such persons should happen to be dependent upon the testator, the existence of such relatives in no sense involves the material welfare of husband and wife. Upon her husband's death, the absence of any of such surviving heirs is a wholly fortuitous circumstance as far as the widow is concerned. Certainly, the presence or absence of such surviving heirs does not warrant a variation of the "paramount rights of the widow", so as to make her indefeasible "distributive share" change from one-half to "the whole", or vice versa, vicariously.

In this case, when the testator executed his will in 1934, and even when he became critically ill in March, 1945, he had a brother living. If he had died shortly after he was stricken, the widow in this case could not have claimed more than one-half. Should the fact that the brother died first, while the testator was lingering in a paralyzed condition, render the testator's will inoperative and deprive him of any power or right to dispose of any part of his personal estate? Is this not an absurd and unjust result?

Counsel has been unable to find any case wherein the widow has been held to be entitled to take the entire personal estate of her husband, regardless of the amount thereof, contrary to his last will and testament. There are statutes in certain states wherein the widow is given the paramount right to take all of the estate up to a fixed limit, usually up to around \$2,500. Cf. Section 18, Decedent Estate Law (Chapter 13, Consolidated Laws) New York.

While the cases cited are not on all fours, there is a very pertinent statement in Section 201, Page on Wills, as follows:

“Under some statutes it is necessary to distinguish between the share which will pass to the surviving spouse in any event of which the decedent can not deprive her, and the greater share which will pass to the surviving spouse in case decedent dies intestate, and usually in case he dies without surviving descendants, of which share he may deprive her by will.”²³

In the case of *Rusing v. Rusing, et al*, 25 Ind. 63, the Court was obviously impressed with the injustice of allowing the widow to take the entire estate contrary to her husband's will, and limited the interest of the widow to prevent injustice to the husband's devisees.

Thus, in this case, the only reasonable construction to be given the phrase “the distributive share of his personal property, which she would have taken had he died intestate” is that it means the one-third *share* which the widow takes if there are surviving children, under the provisions of Section 375 (Section 703, Title 18, D. C. Code

²³ Conn. *Lewis v. Shannon*, 121 Conn. 594, 186 Atl. 540. Iowa. *In Re Noble*, 194 Ia. 733, 190 N. W. 511. Maine. *Given v. Curtis*, 133 Me. 385, 178 Atl. 616. Ohio. *Miller v. Miller*, 129 O. S. 230, 194 N. E. 450. Oklahoma. *Appeal of Sims' Estate*, 162 Okla. 35, 18 Pac. (2d) 1077. New Jersey. *Miller v. Reich*, 134 N. J. Eq. 28, 34 Atl. (2d) 143.”

1940), or the one-half *share* which the widow takes if there are no surviving children, under the provisions of Section 376 (Section 704, Title 18, D. C. Code 1940). Only by such construction can the word "share" be given any significance, and Section 1173 be reconciled with Section 1623 in the light of the common law principles, and the intention of the Congress given effect, and an absurd and unjust result avoided.

VI. The Court Erred in Striking Portions of the Complaint.

The point may not be very material in the present posture of the case; but on the contingency that it may become material, appellant urges that the District Court erred in striking the first three sentences of paragraph 5 and all of paragraphs 7, 9 and 10 of the complaint. (App. 11 A). The reason assigned was that they were deemed immaterial to the issues presented in the case.

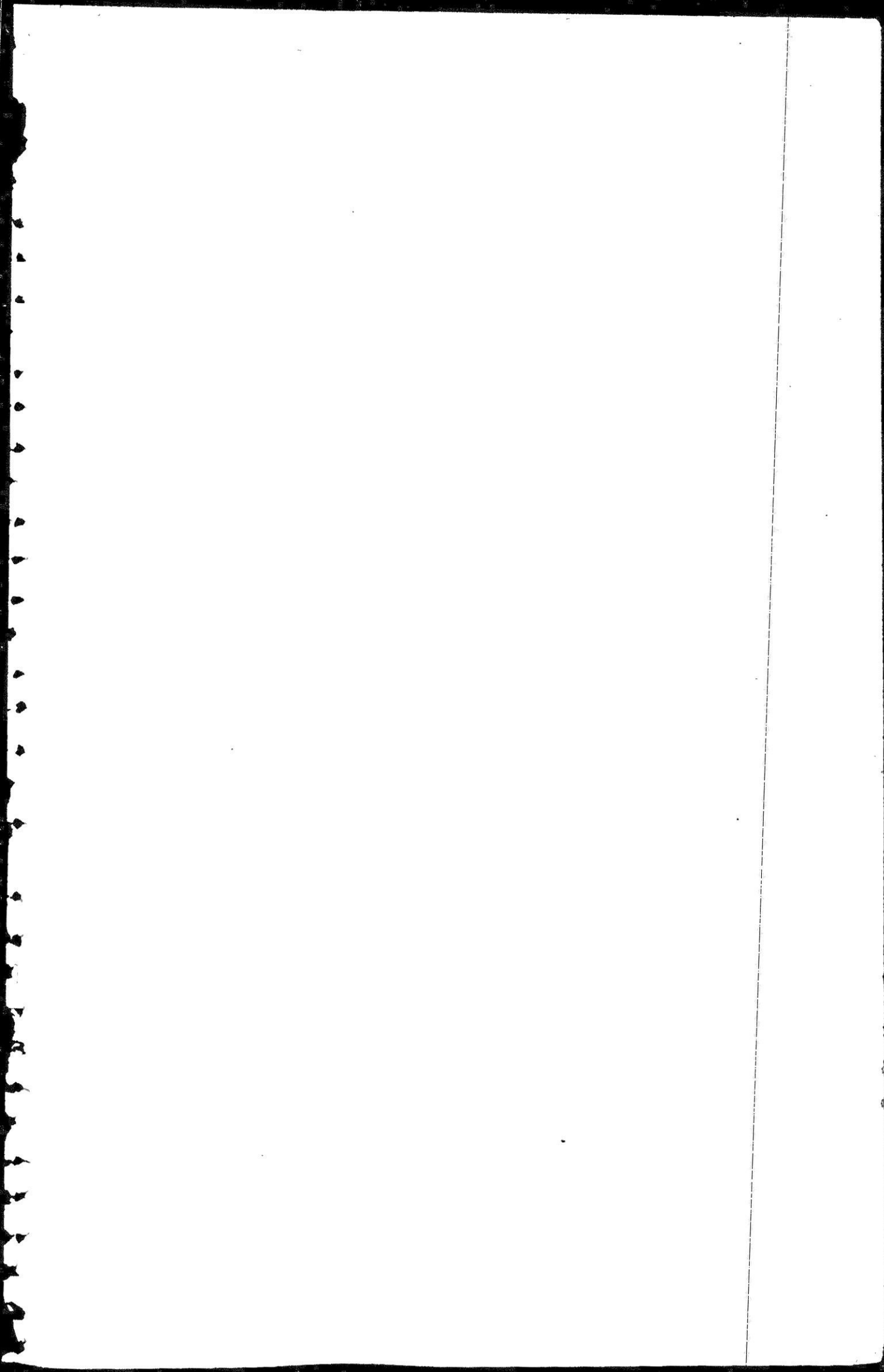
Appellant submits that it was not wholly immaterial for the Court to know that appellee had seized all of the property that the decedent had at the time just prior to appellee's being adjudged of unsound mind and that her committee now had those assets, nor that decedent had carried a policy of insurance on his life in favor of appellee, nor that decedent and appellee jointly owned real estate in Alabama. Likewise, appellant submits that the allegations respecting the close friendship between appellant and the decedent and respecting her taking care of him when he became ill and helpless are not wholly immaterial. The allegations of paragraph 9 served to state the conflicting contention or claims of appellant, in her individual capacity, and appellee, and thus raised the issue for decision by the Court.

CONCLUSION

In conclusion, it is respectfully submitted that the "paramount right" of a surviving widow to a "reasonable part" of her husband's personal estate should not be extended, by application of the literal language of Section 1173 of the Code, to the point where a surviving widow, solely upon the fortuitous circumstance of no surviving parent, brother, sister, niece or nephew, can render inoperative the husband's valid last will and testament and take "the whole" of his net personal estate. Such a result is contrary to the common law and to the intent, of Congress, and is an absurd and unjust result. Under accepted principles of statutory construction, this Court can and should give a reasonable construction to Section 1173 and avoid such absurd and unjust consequences.

Accordingly, it is respectfully submitted that the judgment of the District Court should be reversed.

ALBERT F. BEASLEY,
Investment Building,
Washington 5, D. C.,
Attorney for Appellant.



APPENDIX

INDEX

	PAGE
Complaint	2 A
Exhibit A	9 A
Motion to Strike From Complaint.....	10 A
Order Striking from Complaint.....	11 A
Amendment to Complaint.....	12 A
Answer to Complaint as Amended.....	12 A
Motion for Summary Judgment by Defendant.....	14 A
Motion of Plaintiff for Summary Judgment.....	14 A
Memorandum Opinion	17 A
Order Granting Defendant's Motion for Summary Judgment	19 A
Notice of Appeal.....	20 A

1 A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,041

MAY WEGENAST, in Her Own Right and as Executrix of
the Estate of John H. Pheylan, deceased,
Appellant,

v.

ELIZABETH G. PHEYLEN, Incompetent,
Appellee.

Appeal from the United States District Court
for the District of Columbia

APPELLANT'S APPENDIX

1 Filed Dec 10 1949 Harry M. Hull, Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAY WEGENAST, In Her Own Right and as Executrix
of the Estate of John H. Pheylan, Deceased, 1629
Columbia Road, N. W., Washington, D. C.,
Plaintiff,

v.

ELIZABETH G. PHEYLEN, Incompetent, c/o St. Eliza-
beth's Hospital, Washington, D. C.,
Defendant,

(Also Serve: HAROLD V. BOISVERT, Committee of
the Person and Estate of Elizabeth G. Pheylan, 1225
New York Avenue, N. W., Washington, D. C.

Civil Action No. 5255—'49

Complaint

(Action to Construe Will; To Determine Extent of
Inheritance; and for Declaratory Judgment)

1. Plaintiff invokes the general, original jurisdiction
of the Court (Sections 301, 305, 306 and 325, Title 11,
D. C. Code 1940), the amount in controversy, exclusive
of interest and costs, exceeding the sum of \$3,000.00.

2. Plaintiff is a citizen of the United States and a
resident of the District of Columbia. She is the duly
qualified executrix of the Estate of John H. Pheylan, de-
ceased, having been granted letters testamentary on said
estate by this Honorable Court, holding a Probate Court,
in Administration Number 71,135.

3. The defendant is believed to be a citizen of the
United States and a resident of the District of Columbia.

She is a person non compos mentis, having been adjudged to be of unsound mind by this Honorable Court on February 5, 1926 in Mental Health case No. 2 11,201, and having continuously since that date been a patient at St. Elizabeth's Hospital, this city. Harold V. Boisvert, Esq., has been duly appointed and qualified as committee of the person and of the estate of said defendant by order of this Honorable Court entered in said Mental Health Case. The said defendant is the widow of the late John H. Pheylan, deceased, and is approximately 75 years of age.

4. John H. Pheylan, late a citizen of the United States and a resident of the District of Columbia, departed this life on the 17th of February, 1948, leaving a last will and testament dated the 24th of May, 1934, a copy of which is attached hereto marked "Exhibit A". The said will, having been duly proven by the oaths of the subscribing witnesses thereto, was duly admitted to probate and record as a will of both real and personal property, by order of this Honorable Court, holding a Probate Court, entered on the 14th day of September, 1948 in said Administration No. 71,135. As appears from said will, the said John H. Pheylan devised and bequeathed to plaintiff "May Wegenast, to her and her heirs and assigns forever, all of my estate, both real, personal and mixed, and wheresoever situated, which shall belong to me or be subject to my disposal at the time of my death."

5. According to plaintiff's information and belief, defendant, shortly prior to her being adjudged of unsound mind, seized all of the money and valuables, other than household effects, that the said John H. Pheylan then had, and placed the money in a saving account in her name only with the First National Bank, Birmingham, Alabama. The proceeds of said account, in the amount of approximately \$5,400.00, have been obtained by the

3 committee of defendant's estate, and are now in his possession in the District of Columbia. The said John H. Pheylan carried a policy of insurance upon his life in the principal amount of \$1,000.00, with the defendant named as beneficiary therein; and the committee of defendant's estate has collected the proceeds of said insurance policy, including certain accrued dividends thereon, all in the sum of approximately \$1,200.00. The said John H. Pheylan and the defendant owned forty acres of land in Baldwin County, Alabama, which has a value of about \$2,000; and plaintiff is advised that, under Alabama law, they were tenants in common, so that defendant has a one-half interest therein. Otherwise, the estate of the said John H. Pheylan consisted of cash in bank and in building association, United States War Savings Bonds, stocks, credit balance in United States Civil Service retirement fund, and death benefit of Zamora Temple Benefit Association, all of which assets were acquired or accumulated by the said John H. Pheylan after the defendant was adjudged to be of unsound mind and committed to St. Elizabeth's Hospital, and are of an aggregate value of approximately \$22,000. The said assets are in the possession of plaintiff, as executrix of said decedent's estate, for the purpose of administration of his estate.

6. According to plaintiff's information and belief, the said John H. Pheylan and the defendant did not have any children. At the time of his death, John H. Pheylan was 72 years of age; and both of his parents had predeceased him. The said John H. Pheylan had no sisters, and had only one brother, Paul J. Pheylan, who resided in Richford, New York, and who died in or about August, 1945. The said brother left a surviving widow, but did not have any children. The said John H. Pheylan
4 had no other close relatives, and his heirs at law and next of kin are unknown.

7. Plaintiff was a close personal friend of the said John H. Pheylan, and over a period of many years he turned to her for assistance in times of need, having no near relatives or other close friends to assist him. In March, 1945 the said John H. Pheylan suffered a paralytic stroke, and was critically ill. At the time of his seizure, the said John H. Pheylan lived alone in an apartment, and, by reason of the nature of his illness, the attending physician would not allow him to be moved to a hospital for a period of time, and day and night nurses could not be obtained, so that, plaintiff went to his assistance and for a period of time served as a night nurse, prepared meals and took charge of the running of his household. Later, when he had sufficiently improved to permit being moved to Suburban Hospital, Bethesda, Maryland said John H. Pheylan called upon the plaintiff for services daily, which plaintiff performed, in assisting in nursing him, obtaining personal things needed by him, paying his bills, and handling his affairs, all of which involved daily trips to the hospital and consumed some part of every day during the period up to the time he left said hospital in September, 1946. While the said John H. Pheylan was in the hospital, it became evident that he would continue to be paralyzed and unable to take care of himself. At his direction, plaintiff closed out his apartment and sold his furniture and household effects. Later, when he had recovered sufficiently that he could leave the hospital, and he had no other place to go, plaintiff and her sister, who lived together in an apartment in the District of Columbia, made the necessary arrangements for and obtained a larger apartment, with an additional bed room, so that they might take

5 the said John H. Pheylan into their home and take care of him with the aid and assistance only of a day nurse. Plaintiff obtained the larger apartment in February, 1946, but on account of difficulty in obtaining a suitable day nurse, they were unable to move the said

John H. Pheylan to their home until September, 1946. From that date until the time of his death, the said John H. Pheylan lived in plaintiff's home, and she performed extensive services on each and every day of said period, including the preparing and serving of meals, the performing of nursing services during hours when the day nurse was not in attendance, and the handling of his personal affairs. The said John H. Pheylan many times brought up the matter of compensating plaintiff for her services, but at other times he had expressed concern over his helplessness and as to whether his money would last his life time, and so plaintiff always responded that they could discuss her compensation when he got well, and he would then reply that she would get paid anyway as he had made his will and left everything to her.

8. The said committee of the defendant has asserted the claim that the defendant is entitled to the entire estate of the said decedent, after payment of decedent's debts and expenses of administration, in view of the provisions of Section 211, Title 18, D. C. Code 1940, namely:

"A widow shall be barred of her right of dower in the land and share in the personal estate by any such devise or bequest unless within six months after administration may be granted on her husband's estate she shall file in the probate court a written renunciation * * *.

"By renouncing all claim to any and all devises and bequests, made to her by the will of her husband, she shall be entitled, in addition to her dower, to the distributive share of his personal property, which she would have taken had he died intestate, and, except in cases of valid antenuptial or postnuptial agreements, this provision for the wife shall apply with the (sic) effect (without formal renunciation) to cases where the husband has made no devise or bequest to his wife.";

and in view of the provisions of Section 702, Title 18, D. C. Code 1940, namely:

"If the intestate leave a widow or surviving husband and no child, parent, grandchild, brother, or sister, or the child of a brother or sister of the said intestate, the said widow or surviving husband shall be entitled to the whole."

9. In her individual capacity, plaintiff asserts that the aforesaid provisions of law whereby a widow might claim her "share" in her husband's estate were intended to protect a widow by making her right of inheritance to the widow's "share" paramount to the right of the husband to make a will and convey his property as he might see fit; that the said section should be read and construed in the light of the common law wherein a widow's share was one-third or one-half according to the predicament in which she found herself; and that the said Section 702 of Title 18 of the D. C. Code, in effect, combines the widow's "share" with legislation making the widow an heir at law and next of kin for the purpose of inheriting the entire estate when the decedent does not make a will and does not leave a surviving child, parent, grandchild, brother, sister, or the child of a brother or sister. Thus, the plaintiff asserts that the said Sections 211 and 702 were not intended to be read together so as to create the result that a decedent who does not have a surviving child, parent, grandchild, brother, sister or the child of a brother or sister, shall be deprived of the power and right to leave any part of his estate to any person other than the widow; but that the said Section 211 should be read in conjunction with Sections 703 and 704 of Title 18, wherein the widow is given one-third or one-half of the decedent's estate, according to whether there be surviving children or not; and that, in this case, there being no surviving children, the said defendant is entitled to one-half of the net estate of the said decedent, and no more.

10. If the Court should hold that plaintiff is not entitled to take one-half of the net estate under the terms of the said last will and testament of John H. Pheylan, deceased, then plaintiff will assert a claim as a creditor for the reasonable value of the services rendered the said decedent. And plaintiff, in her individual capacity, must know her rights in respect to inheritance of the estate before time comes to make distribution of the net estate, because at that time the claims of creditors will have been determined.

11. As executrix of said estate, plaintiff must have a judicial construction of the legal effect of the last will and testament of John H. Pheylan, deceased, and of the rights of inheritance of the defendant, so that she may be enabled properly to administer the said estate and make distribution of the assets.

WHEREFORE, the premises considered, plaintiff prays that:

1. Process issue against the defendant; and, if deemed appropriate or necessary by the Court, a guardian ad litem be appointed to appear and defend in behalf of the defendant, as provided for in Rule 17(c), Federal Rules of Civil Procedure.

2. The Court construe the last will and testament of the said John H. Pheylan, deceased, and the provisions of Section 211, Title 18, D. C. Code 1940, and enter an order herein declaring and determining the rights of the plaintiff and the defendant as respects the estate of the said John H. Pheylan, deceased.

3. The Court decree that the defendant is entitled to only one-half of the net estate of John H. Pheylan, deceased; and that the plaintiff shall take the remaining one-half of said estate under the terms of the said last

will and testament of John H. Pheylan, deceased.

8 4. Such other and further relief may be granted
as to the Court may seem just and proper.

/s/ May Wegenast
May Wegenast

/s/ Albert F. Beasley
Albert F. Beasley
300-4 Investment Building
Washington, D. C.
Attorney for Plaintiff

• • • •

9 Filed Dec 10 1949 Harry M. Hull, Clerk

Exhibit A

THE LAST WILL AND TESTAMENT OF
JOHN H. PHEYLAN

I, John H. Pheylan of Washington, D. C., being of sound and disposing mind, memory and understanding, do hereby make and publish this my last Will and Testament, hereby revoking and annulling all wills by me heretofore made, in manner and form following, that is to say:

I give, devise and bequeath to May Wegenast, to her and her heirs and assigns forever, all of my estate, both real, personal and mixed, and wheresoever situated, which shall belong to me or be subject to my disposal at the time of my death.

I do hereby nominate, constitute and appoint May Wegenast, executrix of this, my last Will and Testament, and I desire that my executrix hereinbefore named shall not be required to give bond or other security for the faithful performance of the duties of that office.

IN TESTIMONY WHEREOF, I have set my hand and seal to this, my last Will and Testament, at Washington, D. C. this 24th day of May in the year of our Lord; one thousand nine hundred and thirty four.

John H. Pheyland

SIGNED, SEALED, PUBLISHED, and DECLARED, by John H. Pheyland, the above testator, as and for his last Will and Testament, in our presence, and at his request, and in his presence, and in the presence of each other, we have hereunto subscribed our names as attesting witnesses.

W. W. Coulliette
1353 Irving St., N. W.
Glen M. Brumbaugh
1528 Monroe St., N. E.
Ira W. Patterson
821 Tewkesbury Pl., N. W.
Washington, D. C.

• • • •

10 Filed Jan 3 1950 Harry M. Hull, Clerk

Motion to Strike From Complaint

Harold V. Boisvert, Committee of the person and estate of Elizabeth G. Pheylen, incompetent, by his attorneys, Hamilton and Hamilton, moves to strike from plaintiff's complaint the following matters for the reason that they are immaterial or redundant, or both:

1. The first three sentences of paragraph 5 of the complaint;
2. All of paragraph 7 of the complaint;
3. All of paragraph 9 of the complaint;

4. All of paragraph 10 of the complaint.

HAMILTON and HAMILTON
By /s/ Wm. B. Jones
Attorneys for defendant,
916 Union Trust Building
Washington, D. C.

January 3, 1950

11 Filed Feb 2 1950 Harry M. Hull, Clerk

Order Striking From Complaint

This cause coming on to be heard upon defendant's motion to strike certain allegations from the complaint as immaterial, and the same having been argued by counsel, it is, upon consideration thereof this 2nd day of February, 1950,

ORDERED, That the motion be, and the same hereby is, granted; and that the following portions of the complaint be, and they hereby are, stricken, namely:

1. The first three sentences of paragraph 5 of the complaint.
2. All of paragraph 7 of the complaint.
3. All of paragraph 9 of the complaint.
4. All of paragraph 10 of the complaint.

By The Court
/s/ R. B. Keech
Judge

. . . .

12 Filed Feb 9 1950 Harry M. Hull, Clerk

Amendment to Complaint

Comes now the plaintiff and amends the Complaint by adding the following at the end of paragraph 8, namely:

"Plaintiff, in her individual capacity, claims that the defendant may not take more than one-half of decedent's personal property, as the widow's share of his estate; and that plaintiff is entitled to receive one-half of decedent's estate under and by virtue of his said last will and testament."

/s/ Albert F. Beasley
 Albert F. Beasley,
 300-4 Continental Building
 Washington 5, D. C.
 Attorney for Plaintiff

• • • •

13 Filed Feb 17 1950 Harry M. Hull, Clerk

Answer to Complaint as Amended

Harold V. Boisvert, Committee of the person and estate of Elizabeth G. Pheylan, an incompetent, defendant herein, on behalf of said incompetent defendant answers, pursuant to Rule 17, Federal Rules of Civil Procedure, plaintiff's complaint as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

1. Admits jurisdiction of the Court.
2. Admits the allegations of paragraph (2) of the complaint.

3. Alleges that defendant is a citizen of the United States and a resident of the District of Columbia and that she is approximately 73 years of age. Admits the remaining allegations of paragraph (3) of the complaint.

14 4. Admits the allegations of paragraph (4) of the complaint.

5. The Committee, answering on behalf of said incompetent defendant, alleges that he is without knowledge or information sufficient to form a belief as to the facts alleged in paragraph (5) of the complaint.

6. Admits the allegations of paragraph (6) of the complaint.

7. Answering paragraph (8) of the complaint, admits that said Committee has asserted, and alleges that he does now assert, the claim that defendant is entitled to the entire estate of John H. Pheylan, deceased, after payment of decedent's debts and expenses of administration. Alleges that defendant's claim is not limited to the sections of the code quoted in paragraph (8) of the complaint. Denies that defendant may not take more than one-half of decedent's property as the widow's share of his estate; and further denies that plaintiff is entitled to receive one-half of decedent's estate under and by virtue of the latter's last will and testament.

8. Admits the allegations of paragraph (11) of the complaint.

Wherefore, it is prayed that the Court enter a judgment declaring that the incompetent defendant is entitled to the entire estate of her deceased husband, John H. Pheylan, after payment of decedent's debts and expenses of administration, together with costs and such other and further relief as to the Court may seem just and proper.

HAMILTON and HAMILTON
WM. B. JONES
Attorney for Defendant

• • • •

16 Filed Dec 1 1950 Harry M. Hull, Clerk

Motion for Summary Judgment by Defendant

Harold V. Boisvert, Committee of the person and estate of Elizabeth G. Pheylan, an incompetent, defendant herein, moves the Court that it entered pursuant to rule 56 of the Federal Rules of Civil Procedure a summary judgment in defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that this defendant is entitled to a judgment as a matter of law.

HAMILTON and HAMILTON
WM. B. JONES
Attorney for Defendant

• • • •

17 Filed Dec 26 1950 Harry M. Hull, Clerk

Motion of Plaintiff for Summary Judgment

Comes now the plaintiff, by her attorney, and moves the Court for summary judgment, determining that the defendant is entitled to one-half of the net personal estate of John H. Pheylan, deceased, and that the plaintiff is entitled to the remaining one-half under and by virtue of the last will and testament of the said John H. Pheylan, deceased; and, in support thereof, respectfully shows unto the Court that:

1. There is no genuine issue as to any material fact.
2. Section 1173, D. C. Code 1901 (Section 211, Title 18, D. C. Code 1940) was originally enacted to require a widow to elect between the provisions of her husband's will and her dower interest in realty and reasonable part of personalty. By renouncing, the widow became entitled to one-third of the husband's personal property after payment of his debts under the statute as originally enacted. As appears from the legislative history, the purpose of

the 1920 amendment to said Section 1173 was to place husband and wife upon an equal basis; and the substitution of the phrase "the distributive share of his personal property, which she would have taken had he died intestate" for the one-third part after payment of debts was made to give effect to the varying conditions between

the one-third part payable to the widow under Section 375, D. C. Code 1901 (Section 703, Title 18,

D. C. Code 1940) if the deceased left surviving children, and the one-half part payable to the widow under Section 376, D. C. Code 1901 (Section 704, Title 18, D. C. Code 1940) if the deceased left no surviving children.

The common law rule in the District of Columbia was and is that the wife was entitled to her "reasonable part" of her husband's personal property upon his death, which was either one-third or one-half, according to her predicament; and her right to such reasonable part was paramount to the husband's right to dispose of his property by will, in the absence of her consent. The legislative history of the 1920 amendment to said Section 1173 of the Code shows that there was no purpose or intent to abrogate this common law rule; but, rather, that the purpose was to give effect to it.

3. Section 374, D. C. Code 1901 (Section 702, Title 18, D. C. Code 1940) giving the widow or surviving husband "the whole" of the intestate's personal estate, when the intestate does not leave surviving a "child, parent, grandchild, brother, or sister, or the child of a brother or sister of the said intestate", makes the widow or surviving husband an heir or next of kin, in effect, and merges the widow's share into an inheritance of all of the intestate's personal property under the conditions stated and in the absence of a valid will. Under Section 1623, D. C. Code 1901 (Section 201, Title 19, D. C. Code 1940), that part of "the whole" over and above the widow's reasonable part is subject to be passed by the testator's last will and testament because such personal prop-

erty might pass by deed or gift, or would, in case of the proprietor's dying intestate, descend to or devolve on his or her heirs or other representatives. The said Section 1623 is not limited by its terms to married men with surviving parents, brothers, sisters, nieces or nephews.

4. Under the said Section 1173, the widow is entitled to her indefeasible "distributive share" of her husband's personal property, which admittedly may vary, dependent upon whether there be surviving children or not; but there is nothing in the common law, the legislative history of the statute, or public policy that makes such "share" become "the whole" upon the non-existence of surviving parents, brothers, sisters, nieces, or nephews. The widow may be said to have had control of the existence or non-existence of children; but the existence or non-existence of surviving parents, brothers, sisters, nieces or nephews is a wholly fortuitous circumstance as far as the widow is concerned, which does not alter the obligations of her husband to her and should not give her "paramount rights" over all of her husband's personal property.

5. The Court should construe the said Section 1173 as giving the surviving spouse the paramount or indefeasible right to one-half or one-third of the personal property of the deceased spouse, depending on the existence or non-existence of surviving children, but no more, to give effect to the intent of the Congress and to avoid the absurd, harsh and oppressive results of depriving a married person of the right to dispose of any part of his or her personal property by a valid last will and testament unless he or she should leave a surviving parent, brother, sister, niece or nephew.

/s/ Albert F. Beasley
 Albert F. Beasley,
 Continental Building
 Washington 5, D. C.
 Attorney for Plaintiff

* * * *

34 Filed Jan 12 1951 Harry M. Hull, Clerk

Memorandum Opinion

These are motions for summary judgment brought by both parties to the instant action whereby is sought judicial construction of the provision of the District of Columbia Code relating to the effect of a widow's renunciation of her deceased husband's will, upon the will as a whole.

The plaintiff, in addition to being executrix of the will of John H. Peylen, who died in February 1948, is the sole legatee and devisee named in the will. The defendant, an incompetent since 1926, is the widow of said John H. Pheylen, suit being maintained through her committee. The will was duly admitted to probate and revealed that the widow was the sole living legal heir, there having been no children of the marriage, and all of the husband's family having pre-deceased him. The widow,
35 through her committee, then renounced the will.

The question presented for the Court's determination is as to what estate will devolve upon the widow upon her renunciation, there being no intermediate legal heirs.

The sections of the local code with which the Court is concerned are:

Section 49-301: The Common law, all British Statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general Acts of Congress not locally inapplicable in the District of Columbia, and all Acts of Congress by their terms applicable to the District of Columbia, and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force

except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress.

Section 15-211: * * * by renouncing all claim to any and all devises and bequests, made to her by the will of her husband, she shall be entitled in addition to her dower, to the distributive share in his personal property, which she would have taken had he died intestate, * * * this provision for the wife shall apply with the effect (without formal renunciation) to cases where the husband has made no devise or bequest to his wife * * *.

Section 18-702—If the intestate leave a widow * * * and no child, parent, grandchild, brother, or sister, or the child of a brother or sister of the intestate, the said widow * * * shall be entitled to the whole.

36 Plaintiff seeks a construction of Section 15-211 supra, which will limit the size of the estate devolving upon the widow to one-half of the deceased's estate. Argument in support thereof is based upon the common law theory of "reasonable share".

It is the opinion of the Court that the widow who renounces a will made by her husband, where there are no intervening heirs, is entitled to the whole of her husband's personal estate.

Section 49-301 supra, provides that the common law as it existed in Maryland in 1901, shall have force and effect if Congress does not legislate in such a manner as to supersede any doctrines which may be applicable in a given situation. In the present instance Congress has so legislated, and the provision that the wife is entitled to that "which she would have taken had he died intestate" is clear. It follows then, that Section 18-702 supra, is determinative of the amount to which the widow is entitled.

Judgment for the defendant.

/s/ Charles F. McLaughlin
Judge

* * * *

37 Filed Feb 12 1951 Harry M. Hull, Clerk

*Order Granting Defendant's Motion
for Summary Judgment*

This cause having come on to be heard on the 11th day of January, 1951, on the motions for summary judgment filed herein by both plaintiff and defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure; and the court having considered the pleadings and heard the oral argument of counsel in support of their respective motions and having found that there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the trial court; and having concluded that defendant, Elizabeth G. Phey-lan is entitled to judgment as a matter of law, it is by the court this 12th day of February, 1951,

ADJUDGED, ORDERED AND DECREED:

- (1) That the defendant's motion for summary judgment be and the same is hereby granted.
- (2) That the plaintiff's motion for summary judgment be and the same is hereby denied.

38 AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, Elizabeth G. Phey-lan, an incompetent, is entitled to the entire estate of John H. Pheylen, deceased, after the debts, obligations, and costs of administration of the said estate as approved by the Probate Court have first been paid.

/s/ Charles F. McLaughlin
Judge

* * * *

39 Filed Mar 13 1951 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this 13th day of March, 1951, that the plaintiff, May Wegenast, in her own right and as Executrix of the Estate of John H. Pheylan, deceased, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 12th day of February, 1951 in favor of the defendant and against said plaintiff.

/s/ Albert F. Beasley
 Attorney for Plaintiff.

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

United States Court of Appeals

District of Columbia

FILED SEP 27 1951

No. 11,041

Elizabeth G. Pheylen

Appellee

MAY WEGENAST, In Her Own Right and as Executrix
of the Estate of John H. Pheylen, Deceased, *Appellant*,

v.

ELIZABETH G. PHEYLEN, Incompetent, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

WILLIAM B. JONES,
GEORGE E. HAMILTON, JR.,
916 Union Trust Building,
Washington 5, D. C.,
Attorneys for Appellee.

September, 1951.

STATEMENT OF QUESTION PRESENTED.

In the opinion of the appellee, the question is:

Whether, under the provisions of Section 1173, as amended, D. C. Code 1901 (Section 18-211, D. C. Code 1940), and Section 374, as amended, D. C. Code 1901 (Section 18-702, D. C. Code 1940), the appellee, a widow, takes the whole of her deceased husband's net personal estate; the husband, having died testate, left no child, parent, grandchild, brother or sister, or the child of a brother or sister, and in his will he devised and bequeathed his entire estate, real, personal and mixed, to appellant in her individual capacity.

INDEX.

	Page
Statutes Involved	1-2
Summary of Argument	2-3
Argument	3-14
Appellee is entitled to entire net personal estate of deceased husband under Section 1173, as amended, D. C. Code 1901 (Sec. 18-211, D. C. Code 1940) and Section 374, D. C. Code 1901 (Sec. 18-702, D. C. Code 1940).	3-4
Common law does not limit appellee to one-half of deceased husband's net personal estate.	5-7
If Section 1173, as amended, and the common law should conflict, the latter is no longer in effect. ..	7-9
Congress intended and provided by the 1920 amendment to Section 1173 that a widow, under the circumstances of this case, should take the whole of her deceased husband's net personal estate.	9-13
The District Court properly struck certain matter from the Complaint.	13-14
Conclusion	15

TABLE OF CASES:

<i>Griffith v. Griffith's Executors</i> , (Md.), 4 H. & Me. H. 101	5
<i>Coomes v. Clements</i> , (Md.), 4 H. & J. 480	5, 6, 7
<i>Jordan v. American Security & T. Co.</i> , 38 App. D. C. 391	6, 7
<i>Mead v. Phillips</i> , 77 U. S. App. D. C. 365, 135 F. 2d 819	7
<i>American Investment Co. v. Ludwig</i> , (D. C. Minn., 1949), 82 F. Supp. 265	14
<i>Watts Electric & Manuf'g. Co. v. United-Carr F. Corp.</i> , (D. C. Mass., 1939), 27 F. Supp. 277	14
<i>Shephard v. Popular Publications, Inc.</i> , (D. C., S. D. N. Y., 1950), 14 Fed. Rules Serv. 8b. 2, Case 1	14

STATUTORY AND RULE CITATIONS:	Page
Section 374, as amended, D. C. Code 1901 (31 Stat. 1249; 41 Stat. 563; Sec. 18-702, D. C. Code 1940)	2, 3, 4, 7, 9, 10, 11
Section 375, D. C. Code 1901 (31 Stat. 1249; Sec. 18-703 D. C. Code 1940)	12
Section 376, D. C. Code 1901 (31 Stat. 1249; Sec. 18-704 D. C. Code 1940)	7, 11, 12
Section 1173, as amended, D. C. Code 1901 (31 Stat. 1376; 41 Stat. 567; Sec. 18-211, D. C. Code 1940)	2, 3, 4, 7, 8, 9, 10, 12
Section 1160, D. C. Code 1901 (31 Stat. 1375)	9
Section 49-301, D. C. Code 1940 (31 Stat. 1189)	3, 9
Acts of Maryland, 1798, Chapter 101, Sub-chapter 11, Sections 1 and 3 (sometimes cited No. C I, Chapter 10, Section 11).	1, 6
Rule 8 (e), Federal Rules of Civil Procedure, 28 U. S. C. A.	14
Rule 12 (f) Federal Rules of Civil Procedure, 28 U. S. C. A.	14

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,041.

MAY WEGENAST, In Her Own Right and as Executrix
of the Estate of John H. Pheylan, Deceased, *Appellant*,

v.

ELIZABETH G. PHEYLEN, Incompetent, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR APPELLEE.

STATUTES INVOLVED.

In addition to the District of Columbia Code provisions cited and quoted on pages 4-6 inclusive of Appellant's Brief, the following Maryland statutory provisions are pertinent:

Acts of Maryland, 1798, Chapter 101, Sub-Chapter 11
(sometimes cited No. C I, Chapter 10, Section 11).

When all the debts of an intestate, exhibited and proved, or notified and not barred, shall have been discharged, or settled and allowed to be retained, as hereinafter directed, the administrators shall proceed to make distribution of the surplus as follows:

1. If the intestate leave a widow, and no children, parent, grand-child, brother or sister, or the child of a brother or sister of the said intestate, the said widow shall be entitled to the whole.

* * *

3. If there be a widow, and no child or children or descendants of the intestate, but the said intestate shall leave a father or mother, or brother or sister, or children of a brother or sister, the widow shall have one half.

* * *

Summary of Argument.

1. John H. Pheylen, the deceased husband of appellee, died leaving no child, parent, grandchild, brother or sister, or child of a brother or sister. By his will be bequeathed and devised his entire estate to appellant in her individual capacity—he made no provision for his surviving widow. Under those circumstances, appellee takes the whole of decedent's personal estate in accordance with the provisions of Section 1173, as amended, D. C. Code 1901 (Section 18-211, D. C. Code 1940) and Section 374, as amended, D. C. Code 1901 (Section 18-702, D. C. Code 1940).

2. Contrary to the contention of appellant that the common law limited a widow's share in her husband's personal estate to not more than one-half thereof, the common law of Maryland and the District of Columbia gave to a widow, where she was the sole survivor of her husband, his entire net personal estate. But assuming that appellant is correct in her view that at common law appellee would be limited to one-half, that common law rule would no longer be in force in the District of Columbia since it would be inconsistent with Section 1173, as amended, D. C. Code

1901 (Section 18-211, D. C. Code 1940), which provides that a widow, who was not provided for in her husband's will, will take the share of his personal estate which she would have taken had he died intestate, and Section 374, as amended, D. C. Code 1901 (Section 18-702, D. C. Code 1940), which distributes to the widow, as the sole survivor of her husband, the whole of the intestate husband's net personal estate. Section 49-301, D. C. Code 1940.

3. The matter stricken from the complaint by the District Court was properly stricken. That matter had no bearing on the issue of whether the appellee took the whole or only one-half of her husband's personal estate and for that reason it was immaterial. In addition the matter was properly stricken because it failed to comply with the requirements of simple, concise, and direct pleading, and also because some of it was argumentative.

Argument.

The testator, John H. Pheylan, is survived by his incompetent widow, the appellee. They had no children. Testator's parents predeceased him as did his only brother. He had no sisters. The deceased brother had no children. Testator made no provision in his will for his widow but, instead, left his entire estate to the appellant in her individual capacity. Because of those circumstances, appellee, represented by her committee, contends that, under the laws of the District of Columbia, she is entitled to the testator's entire personal estate. The District Court awarded summary judgment for appellee and from that judgment this appeal has been taken.

It is submitted that the controlling District of Columbia law is found in Section 1173 as amended, D. C. Code 1901 (31 Stat. 1376; 41 Stat. 567; Sec. 18-211, D. C. Code 1940) and Section 374, as amended, D. C. Code 1901 (31 Stat. 1249; 41 Stat. 563; Sec. 18-702, D. C. Code 1940).¹

¹ To conform to the citations in Appellant's Brief, the 1901 Code citations are used in this brief. They are followed by appropriate references to the 1940 Code.

The pertinent provisions of Section 1173 as amended (Sec. 18-211, D. C. Code 1940) are:

By renouncing all claim to any and all devises and bequests made to her [widow] by the will of her husband, she shall be entitled, in addition to her dower, to the distributive share of his personal property, which she would have taken had he died intestate, and, * * *, this provision for the wife shall apply with the [sic] effect (without formal renunciation) to cases where the husband has made no devise or bequest to his wife.

The distribution of an intestate husband's personal property, after the debts have been discharged, is provided for in the District of Columbia Code. Section 373 et seq., D. C. Code, 1901 (Sec. 18-701, et seq., D. C. Code 1940). Section 374 of the 1901 Code, as amended (Sec. 18-702 D. C. Code 1940) states:

If the intestate leave a widow or surviving husband and no child, parent, grandchild, brother or sister, or the child of a brother or sister of the said intestate, the said widow or surviving husband shall be entitled to the whole.

The District Court, by applying the foregoing code provisions to the facts in this case, rendered judgment for the appellee. (Appellant's Appendix, pp. 18A, 19A.)

Appellant contends that the District Court erred in decreeing that the entire net personal estate of testator is the property of the appellee but that, instead, only one-half of that estate should go to appellee while the remaining one-half should be the property of appellant. (Appellant's Brief, p. 3, pp. 26-27.) Appellant's arguments for her position may be considered under two headings, (1) the lower court's judgment disregards the controlling common law, and (2) the District of Columbia Code sections, *supra*, did not and were not intended by Congress to abrogate or modify the common law. Consideration will now be given to those arguments.

1. Common law. Appellant contends that the common law rule in Maryland at the time of the creation of the District of Columbia was that a widow had a paramount right to her dower in the realty and to a reasonable part of the personal property of her husband and that he could not deprive her of that right by his will. According to the appellant the widow's reasonable part of the husband's personal property was one-third if there were surviving children, and one-half if there were no surviving children. This is the rule which appellant insists is now in effect as a part of the common law of the District of Columbia, and that under it the appellee, since no provision was made for her in her husband's will, takes her common law share in his personal property, which is one-half.

Appellant cites four cases in support of her position. Two of those are Maryland cases and two are cases decided by this Court. It is submitted that there is nothing in those authorities which would limit a widow's share in her husband's personal property to one-half if she were the sole survivor.

In *Griffith v. Griffith's Executors*, (Md.), 4 H. & McH. 101, where the testator was survived by both a widow and children, the court spoke only of a widow's share being one-third of her husband's personal estate.

Coomes v. Clements, (Md.), 4 H. & J. 480, held that a widow, to whom the husband in his 1817 will made no bequest of his personal property, was entitled to one-half of the personal estate. The opinion disclosed that the testator left no children or descendants but it was silent as to whether he was survived by a parent, brother or sister, nephew or niece. However, the court said that, since the testator made no bequest of any part of his personal estate to his widow, as to her he died intestate. 4 H. & J. 483. An examination of the Maryland Statutes then in effect discloses that, in the case of a man dying intestate, "If there be a widow, and no child or children or descendants of the intestate, but the said intestate shall leave a father or

mother, or brother or sister, or children of a brother or sister, the widow shall have one-half" of the net personal estate. Acts of Maryland, 1798, Ch. 101, Sub-Ch. 11, Sec. 3. And in Section 1 of Sub-Ch. 11 of that Act it was provided that "If the intestate leave a widow, and no children, parent, grand-child, brother or sister, or the child of a brother or sister of the said intestate, the said widow shall be entitled to the whole" of the net personal estate. Thus it is to be concluded that in the *Coomes* case, since the widow took only one-half, the ~~intestate~~^{husband} left a parent, or a brother or sister, or children of a brother or sister. Moreover, it is to be noted that the court in the *Coomes* case stated that the 1798 Act, quoted from above, and prior acts of the Maryland Assembly, contained "a clear, unequivocal, and explicit recognition of that principle of the common law, which allows to the wife a reasonable part of the personal estate of her deceased husband." 4 H. & J. 483. Section 1 of the 1798 Act, quoted above, provided that in the case of an intestate husband who left a widow but no other survivors, the widow took the whole of the net personal estate. Therefore, it is to be concluded that at common law, as recognized in Maryland, a widow in the circumstances described took the whole of the net personal estate of her intestate husband.

In *Jordan v. American Security & T. Co.*, 38 App. D. C., 391, this Court was called upon to decide whether the estate of a widow, who in her lifetime had failed to renounce the will of her husband, was entitled to the widow's share of the deceased husband's personal estate, since he had in effect neither devised nor bequeathed to her any of his property. In holding that the widow's estate should recover, this Court said that the husband was "deemed to have died intestate of his personal property as to his wife." 38 App. D. C. 397. While the widow's estate took one-half of the husband's personal property, it is to be noted that he left a nephew. Under the Code, the net personal estate of an intestate husband, leaving only a widow and a nephew, is

divided equally between the survivors. Section 376, 1901 Code (Sec. 18-704, D. C. Code, 1940).

Mead v. Phillips, 77 U. S. App. D. C. 365, 135 F. 2d 819, involved the question of whether an incompetent widow had to renounce her husband's will in order to take her rights in his property which she would have taken if he had died intestate. In holding that, under the circumstances of the case, renunciation was not necessary, this Court said "The statutory provision for widows in the District constitutes a recognition and, in part, a restatement of her rights at common law." 77 U. S. App. D. C. at p. 371, 135 F. 2d at p. 825. In a footnote (f. n. 29) the "statutory provision for widows" included Section 18-702, D. C. Code 1940 (Sec. 374, D. C. Code 1901). As has been noted, that is the section which provides for the distribution of the entire net personal estate to the widow when the intestate leaves "no child, parent, grandchild, brother or sister, or the child of a brother or sister."

It is submitted that not only do the authorities cited by appellant fail to support her position but that the *Mead* case decided by this Court and the *Coomes* case decided by the Maryland Court of Appeals disclose that at common law a widow, situated like the appellee, took the entire net personal estate of her husband.

2. District of Columbia Code provisions. In an effort to sustain her position that the common law limits appellee's share in her husband's personal estate to one-half, appellant argues that Section 1173, as amended, of the D. C. Code 1901 (Sec. 18-211, D. C. Code 1940) did not abrogate the common law rule that a widow was entitled to only a "reasonable part" of her deceased husband's personal estate.

Section 1173 is an election statute by the terms of which a competent widow must elect whether to take the devises and bequests provided for her in her deceased husband's will or to renounce the will and take other rights, recognized by the statute, in her husband's estate. *Jordan v.*

American Security & T. Co., 38 App. D. C. 391. As originally enacted, Section 1173 provided that a widow renouncing her husband's will was "entitled to *one-third part of the personal estate* of her husband which shall remain after payment of his just debts and claims against him, *and no more.*" (Emphasis supplied.) 31 Stat. 1376. Since it is appellant's view that the common law awarded to a widow one-half of her husband's personal estate when he left no children, it is inconsistent to contend that Section 1173, when it gave to the widow a one-third part "and no more", even when there were no children, was a recognition and restatement of the common law rights of the widow. But appellant places herself in that inconsistent position when on page 14 of her brief she states:

While Section 1173 gave the widow a right to only one-third of her deceased husband's personal estate, instead of the alternative one-third or one-half as determined by the common law rule, there does not appear to have been any purpose to abrogate the common law rule giving a widow the "paramount right" to a "reasonable part" of her deceased husband's personal estate. On the contrary, *the purpose was to recognize and restate the common law rights of the widow in this respect.* (Emphasis supplied.)

In 1920, Section 1173 was amended to provide that when a widow renounced her husband's will, or without renouncing when she was not provided for in the will, she was entitled "to the distributive share of his personal property, which she would have taken had he died intestate." (41 Stat. 567.) As so amended, Section 1173 of the 1901 Code is now Section 18-211, D. C. Code 1940.

In order to ascertain what a widow, who is the sole survivor of her husband, "would have taken had he died intestate," it is necessary to refer to the statutes providing for the distribution of an intestate's personal property. Those statutes reveal that such a widow would take the whole personal estate after the discharge of debts. Section

374, as amended, D. C. Code 1901; Section 18-702, D. C. Code 1940. Thus, if appellant should be correct in her contention that at common law a widow could not take more than one-half of her husband's personal estate, it is to be concluded that Section 1173 as amended is inconsistent with the common law and that the latter, so far as it pertains here, is no longer in effect. Section 49-301, D. C. Code 1940.

The appellant has also stated in her brief (p. 16) that the only explanation given to Congress with respect to what became the 1920 amendment to Section 1173 "was that either widow or widower would get one-third of the deceased spouse's personal property if there were children surviving or one-half of such property if no child survived." (See also Appellant's Brief p. 21) It is respectfully submitted that no such explanation was given.

As appellant explained in her brief (pp. 15-16) the only discussion of the proposed amendment to Section 1173 was in the hearing before the House Committee on the Judiciary, Sixty-Fourth Congress, First Session, on H. R. 14974.² The purpose of the legislation was to correct certain defects found in the 1901 Code (see Statement of Chief Justice Covington, Supreme Court of the District of Columbia, pp. 5-8, Hearings before the Committee on the Judiciary, House of Representatives, Sixty-Fourth Congress, First Session on H. R. 14974, Serial 47, May 5, 1916;³ and statement of A. A. Hoehling, Jr., of the District of Columbia bar, Hearings p. 8). One of those defects was found in Section 1160, D. C. Code, 1901, where it was provided that when a married woman died intestate her husband was to be preferred as her administrator and after payment of her debts "her said personal estate shall be the property of her

² As was pointed out by appellant (Br. pp. 15-16), it was H. R. 6025, Sixty-Sixth Congress, Second Session, that was enacted into law. So far as pertinent here that bill and H. R. 14974, Sixty-Fourth Congress, First Session, were identical bills. The Sixty-Sixth House Committee was familiar with the hearings conducted during the Sixty-Fourth Congress. Page 5, Hearings before Subcommittee No. II of the Committee on the Judiciary, House of Representatives, Sixty-Sixth Congress, First Session on H. R. 4471 and H.R. 6025, Serial 3, August 25, 1919.

³ Hereafter for convenience cited as "Hearings."

husband.” This resulted in inequality of treatment between surviving husband and wife in that, insofar as is pertinent here, the surviving husband took his intestate wife’s entire net personal estate whether or not she left children or other relatives, while, under Section 374, 1901 Code, as has been noted above, the surviving wife took her intestate husband’s entire net personal estate only when she was the sole survivor. The legislation proposed to equalize the situation by repealing Section 1160 and inserting in Sections 374 to 377 inclusive (Sections 18-702 to 18-705, D. C. Code 1940) after the word “widow” the words “or surviving husband.” The effect of those amendments (which were adopted in 1920) was to provide that in case the wife died intestate the surviving husband would take no greater or no less share of her personal estate than the wife would have taken of his if the husband as an intestate had predeceased her.

It was the foregoing that brought forth the following colloquy by members of the District of Columbia bar before the House Committee on the Judiciary (Hearings pp. 80-81; also quoted on page 18, Appellant’s Brief):

Mr. Hoehling. * * * Now, 1160 we eliminate entirely. We have provided for that in other sections.

Mr. Easby-Smith. That is one that gives the husband all of the wife’s personal property. We put him now on the same footing with the wife.

Mr. Hoehling. 1173, on the next page, carries out the same idea of putting a wife and husband on an equality. We had a provision in the code as to renunciation by the wife, and we make that same provision for the husband.

Mr. Sullivan. She can take her legal share.

Those statements of Mr. Hoehling and Mr. Sullivan were the only references to Section 1173 at the Committee hearing. The appellant begs the question in stating that their remarks were an explanation that under the proposed amendment “either widow or widower would get one-third of the deceased spouse’s personal property if there were

children surviving or one-half of such property if no child survived." (Appellant's Brief, p. 16.)

Nor is appellant aided in her argument by the other statements before the Committee which she quotes on pages 17 and 18 of her brief. In the first italicized statement on page 17 (p. 72, Hearings) Mr. Sullivan is quoted as saying, "but by this he [surviving husband] is given exactly the same as the wife would get. In other words, if they have no children, he gets one-half." Obviously Mr. Sullivan was mistaken. He was answering a question as to what change the amendment to Section 374 would effect. That section before the amendment provided that the surviving widow of an intestate took all of his net personal estate. The only change the amendment made to the section was to add that if the husband survived the intestate wife he would take the whole of her net personal estate. This amendment was adopted in 1920 and the section as amended is now Section 18-702, D. C. Code 1940.

Again on page 18 of Appellant's Brief (p. 73, Hearings), Mr. Sullivan is quoted as saying:

In other words, where there are no children, the surviving spouse gets half. Where there are children, the surviving spouse gets one-third. That is the present law, but under the present law there is a discrimination between the husband and the wife, and we are eliminating that discrimination. * * *

Mr. Sullivan made that statement in an effort to clarify the meaning of the proposed amendment to Section 376 of the 1901 Code. That section, before the amendment, gave the wife one-half of her intestate husband's net personal estate when the husband died leaving a widow and a parent, or brother or sister, or child of a brother or sister, but no child or descendant of his own. The amendment, which was adopted in 1920 (Section 18-704, D. C. Code 1940) gave a surviving husband one-half of his intestate wife's net personal estate in cases where the wife died leaving no child or descendant but was survived by one or more of the other

relatives mentioned. Mr. Sullivan was correct in stating that the "present law", i.e. Sections 375 and 376, gave the wife one-third where there were children and one-half where there were no children. But that was not all of the "present law" because as has been noted Section 374 gave the wife the whole of the personal estate of the intestate husband.

Appellant has also stated in her brief (p. 16) "that there is nothing in the entire legislative history of the amendments to indicate any purpose or intent to abrogate or change the common law rule respecting the rights of a widow to share in her deceased husband's personal estate." If appellant should be correct in her contention that, according to common law, under no conditions would a surviving wife take more than one-half of the net personal estate of her husband, then it is submitted that the legislative history does show an intent by Congress to change that rule. In House Judiciary Committee Report 481, Sixty-Sixth Congress, Second Session, which favorably reported H. R. 6025, there appeared parallel tables showing the law as it then existed and as it was proposed to be amended. Section 1173 as it then existed was shown to provide that the widow by renouncing her husband's will would be entitled to "one-third part of the personal estate of her husband * * * and no more." In the parallel column showing the proposed change, it was disclosed that the widow would be entitled "to the distributive share of his personal property, which she would have taken had he [husband] died intestate." The parallel columns also showed that a widow of an intestate who died leaving no relatives would take his entire net personal estate. With this information before it the House of Representatives adopted the amendment to Section 1173. (Sec. 18-211 D. C. Code 1940). Thus it is certain that at least one House of the Congress was definitely informed of the amendment it adopted. The Senate, it appears, held no hearings on this legislation but it adopted without change the amendment as it passed the House of Representatives.

In light of the foregoing, it is submitted that in 1920 Congress intended and did provide that in a case, such as the one at bar, where a husband dies leaving a widow but no children or grandchildren or parent, or brother or sister, or child of a brother or sister, the widow takes the whole of his net personal estate if his will makes no devise or bequest to her. Thus the appellee is entitled to her deceased husband's entire net personal estate.

In her brief appellant also raises the question of whether the District Court erred in striking the first three sentences of paragraph 5 and all of paragraphs 7, 9 and 10 of the complaint. (Appellant's Appendix, p. 11A.) In raising the question appellant expresses some doubt as to whether it is "very material in the present posture of the case." Appellee is of the view that the question is as immaterial as the matter that was stricken from the complaint.

As described by appellant's complaint this is an "Action to Construe Will; To Determine Extent of Inheritance; and for Declaratory Judgment." (Appellant's Appendix, p. 2A.) The complaint sets forth facts material to the issue of whether appellant and appellee each takes one-half of the decedent's personal estate or whether appellee takes the whole. In addition there was the matter which the District Court struck from the complaint. Briefly described, that consisted of:

(1) The first three sentences of paragraph 5 where it was stated that appellee's committee has in his possession (a) certain money paid in accordance with the terms of a life insurance policy which decedent had taken out on his own life and in which appellee was named beneficiary, and (b) certain money and valuables of decedent which appellee had seized shortly before she was adjudged of unsound mind in 1926. (Appellant's Appendix, pp. 4A-5A.)

(2) All of the allegations of paragraph 7 of the complaint where appellant described the care and assistance she ren-

dered decedent during a long illness and how decedent advised appellant that she would be compensated for her services since, by his will, he was leaving her his entire property. (Appellant's Appendix, pp. 5A-6A.)

(3) Paragraph 9 of the complaint in which appellant discussed the law and argued that appellee was not entitled to more than one-half of her husband's personal estate. (Appellant's Appendix, p. 7A.)

(4) All of paragraph 10 of the complaint in which appellant stated that if the court held that she was not entitled to one-half of decedent's net estate she would assert a claim as a creditor for her services to decedent and that in such event she needed to know her rights in order that she might make her claim as a creditor within the time allowed. (Appellant's Appendix, p. 8A.)

It goes without saying that the District Court can strike immaterial matter from a complaint. Rule 12 (f), Federal Rules of Civil Procedure, 28 U. S. C. A. A reading of the stricken matter will show that it had no bearing on the question of whether appellee takes all or one-half of her husband's personal estate and, therefore, it was immaterial and was properly stricken. *American Investment Co. v. Ludwig*, (D. C. Minn., 1949), 82 F. Supp. 265. The stricken matter also failed to comply with the requirements of simple, concise and direct pleading. Rule 8 (e), Federal Rules of Civil Procedure, 28 U. S. C. A. Such a failure is a ground for striking from the complaint. *Watts Electric & Manuf'g. Co. v. United-Carr F. Corp.*, (D. C. Mass., 1939), 27 F. Supp. 277. Some of the matter was argumentative and therefore was properly stricken. *Shephard v. Popular Publications, Inc.*, (D. C., S. D. N. Y., 1950), 14 Fed. Rules Serv. 8b. 2, Case 1. It is submitted that the District Court's action in striking from the complaint was proper.

Conclusion.

In light of the foregoing, it is submitted that:

1. The summary judgment for appellee granted by the District Court should be affirmed;
2. The order of the District Court striking from appellant's complaint should be affirmed.

Respectfully submitted,

WILLIAM B. JONES,
GEORGE E. HAMILTON, JR.,
916 Union Trust Building,
Washington 5, D. C.,
Attorneys for Appellee.

September, 1951.